UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 07-22816-CIV-HUCK
Magistrate Judge Simonton

GENERAL MANUEL ANTONIO NORIEGA,

Movant,

v.

GEORGE PASTRANA,
WARDEN, FCI MIAMI,

AND

CONDOLEZZA RICE,
SECRETARY OF STATE
UNITED STATES DEPARTMENT OF STATE,

Respondents.
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RESPONDENTS' OPPOSITION TO PETITION FOR WRITS OF HABEAS CORPUS, MANDAMUS AND OTHER APPROPRIATE RELIEF

George Pastrana, Warden, FCI, Miami, and Condoleezza Rice, Secretary of State, by and through the undersigned Assistant United States Attorney, hereby submit their opposition to Noriega's petition for writs of habeas corpus, mandamus and other appropriate relief.[1] Through his petition, Noriega challenges a certificate of extraditability issued by Magistrate Judge William

[1] Initially, Respondents note that George Pastrana, the Warden of FCI, Miami, where Noriega is presently incarcerated, is the only proper respondent to Noriega's habeas petition brought pursuant to 28 U.S.C. § 2241, because Pastrana, not the Secretary of State, is Noriega's custodian. *See Padilla v. Rumsfeld*, 542 U.S. 426 (2004) (in habeas challenges to present physical confinement, proper respondent is warden of facility where prisoner is being held, not Attorney General or other remote supervisory official). Therefore, the Secretary of State should be dismissed as a Respondent in this proceeding.

Turnoff.[2] Noriega argues that the Geneva Conventions bar his extradition to France and, even if they do not, the United States did not comply with Article 12 of the Third Geneva Convention prior to seeking his extradition. Noriega's claims must fail because they fall outside the narrow scope of the District Court's review of a certificate of extraditability. Moreover, his claims are meritless. Nothing in the Geneva Conventions prohibits Noriega's extradition to France, and the United States fully complied with the requirements of Article 12 of the Third Geneva Convention prior to filing the complaint seeking Noriega's extradition. Accordingly, the petition should be denied.

I. Procedural History

On February 4, 1988, a federal grand jury in the Southern District of Florida returned a 12-count indictment against Noriega and 15 co-defendants (CRDE 1).[3] Noriega was charged in 11 counts with: RICO and RICO conspiracy (18 U.S.C. § 1962(c) and (d)) (Counts 1 & 2); conspiracy to import and distribute cocaine (21 U.S.C. § 963) (Counts 3 & 9); distribution of cocaine (21 U.S.C. § 959) (Counts 4, 5, & 10); manufacture of cocaine (21 U.S.C.§ 959) (Count 6); conspiracy to manufacture, distribute and import cocaine (21 U.S.C. § 963) (Count 7); and unlawful travel to

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[2] The Secretary of State must issue a surrender warrant within "two calendar months" from the issuance of the certificate of extraditability, or the accused can file a request under 18 U.S.C. § 3188 for his release from custody. The two-month period, however, is tolled if the accused seeks review of his extradition order. *Jimenez v. U.S. District Court for the Southern District of Florida*, ___ U.S. ___, 84 S.Ct. 14, 18 (1963) (where petitioner sought review of extradition order, Secretary of State properly deferred execution of surrender warrant until petitioner's claims were fully adjudicated and the two-month period under § 3188 runs from the time his claims are fully adjudicated); *McElvy v. Civiletti*, 523 F.Supp. 42 (S.D. Fla. 1981) (same). The Secretary of State has not yet issued a surrender warrant for Noriega.

[3] Citations to the record in the criminal case (Case Number 88-00079-CR-WMH) will be referred to as CRDE followed by the appropriate docket entry number. Citations to the extradition proceedings before the magistrate judge (Case Number 07-21830) will be referred to as EXDE followed by the appropriate docket entry number. Citations to the record in this case (07-22816-CIV-HUCK) will be referred to as DE followed by the appropriate docket entry number.

promote a business enterprise involving cocaine (18 U.S.C. § 1952(a)(3)) (Counts 11 & 12 – Count 12 was dismissed prior to trial).

Noriega was arrested in Panama in January of 1990 (CRDE 122). In April 1992, he was convicted on Counts 1-7 and 11 and found not guilty on Counts 9 and 10. Noriega was sentenced to concurrent terms of 20 years' imprisonment on Counts 1 and 2, to be followed by concurrent terms of 15 years' imprisonment on Counts 3-7 and a consecutive term of 5 years' imprisonment on Count 11. Noriega was ordered to serve concurrent terms of 3 years' special parole as to Counts 3-7 (CRDE 1335). On March 4, 1999, the District Court reduced Noriega's sentence to 30 years' imprisonment (CRDE 1679). Noriega was scheduled to be released on parole on September 9, 2007.

On July 17, 2007, the United States filed an initial complaint for the extradition of Noriega, at the request of the Government of the Republic of France, pursuant to the Extradition Treaty between the United States and the Republic of France (EXDE 1). Noriega has been convicted *in absentia* in France on charges of engaging in financial transactions with the proceeds of illegal drug trafficking, an offense that corresponds to money laundering under United States law (*see* 18 U.S.C. §§ 1956 and 1957) (EXDE 1).[4]

On July 23, 2007, Noriega filed a Petition for Writs of Habeas Corpus, Mandamus, and Prohibition seeking an order that the Magistrate Judge immediately cease and desist with any proceedings on the extradition complaint, based on Noriega's argument that the requested extradition violated his rights under the Third Geneva Convention (Geneva III). That petition for writ of habeas corpus was brought under Title 28, United States Code, Section 2255, and was filed as part of Noriega's prior criminal case (CRDE 1702). After a hearing on August 13, 2007 (CRDE

[4] Noriega will, upon his surrender to France, have an opportunity to challenge the *in absentia* conviction and seek a new trial.

1712 [minutes of hearing]), Judge William Hoeveler denied the petition for lack of jurisdiction (CRDE 1713) because Section 2255 "applies to challenges against the sentence imposed, and [Noriega] has not cited any defect in this Court's sentence as to [him]." Judge Hoeveler went on to note that, if he did have jurisdiction over Noriega's petition, he would have denied it on the merits, as "a strict adherence to the terms of [Geneva III], both as to the letter and the spirit of the Convention, does not mandate immediate repatriation but rather supports a decision that Defendant must face those charges which are legitimately brought against him by other parties to the Convention, so long as our international obligations under the Convention are being met." *United States v. Noriega*, 2007 WL 2947572, *4 (S.D. Fla. Aug. 24, 2007)(*Noriega II)*.

Noriega did not file a notice of appeal of this order prior to the extradition hearing, which took place on August 28, 2007 (EXDE 16 [minutes], EXDE 18 [transcript]). Following that hearing, the Magistrate Judge issued a Certificate of Extraditability on August 29, 2007 (EXDE 17).

On September 5, 2007, Noriega filed an Emergency Motion for Stay of Extradition and a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (CRDE 1714 [habeas petition], CRDE 1715 [stay motion]). In those pleadings Noriega, for the first time, asserted that the United States had failed to comply with the requirement of Article 12 of Geneva III that it satisfy itself of the willingness and ability of France to apply the Convention prior to the extradition. These pleadings were again filed as part of Noriega's prior criminal case.[5] That same day, the District

[5] In his Petition, Noriega asserts that his "Counsel sought and received the agreement of the United States to file the Petition before Judge Hoeveler, the parties believing that such petition would eventually be assigned to Judge Hoeveler as a related case." This is not correct. Counsel for Noriega did not consult with the United States regarding the September 5, 2007 petition before that petition was filed. If they had, then they would have learned that the simultaneously filed Emergency Motion for Stay was unnecessary, as the Secretary of State had not yet issued a surrender warrant and Noriega's extradition was not imminent. After the habeas petition had been filed, the United States noted in its response that it did not object to proceeding on the petition as filed.

Court granted the Emergency Motion for Stay, in part, ordering Noriega to present credible evidence in support of the claims made in his Petition for Writs of Habeas Corpus by 9:00 a.m. on September 6, 2007, and ordering the United States to reply by 12:00 p.m. on September 6, 2007 (CRDE 1716). Both Noriega and the United States complied with that order (CRDE 1717 [Noriega's initial filing], CRDE 1718 [United States' filing], CRDE 1719 [Noriega's reply]).

On September 7, 2007, Judge Hoeveler issued an order dismissing the Petition for Writ of Habeas Corpus and lifting the Stay of Extradition (CRDE 1720). Once again, Judge Hoeveler held that he did not have jurisdiction to rule on the habeas petition filed by Noriega. As Judge Hoeveler noted, the proper mechanism for challenging a certificate of extraditability is to file a petition for writ of habeas corpus as a new civil action, not to file such a petition as part of a pre-existing criminal case. Judge Hoeveler went on to note that, if he had jurisdiction over the petition, he would have denied it on the merits because "the United States 'has satisfied itself . . . [that Defendant] will be afforded the same benefits that he has enjoyed for the past fifteen years in accordance with this Court's 1992 order declaring him a prisoner of war.'" *United States v. Noriega*, 2007 WL 2947981, *1 (S.D. Fla. Sept. 7, 2007)(*Noriega III)* (CRDE 1720).

On September 7, 2007, Noriega filed two separate notices of appeal. One notice of appeal sought review of the District Court's August 24, 2007 Order denying his Section 2255 habeas petition (CRDE 1722; CA Case Number 07-14151-E). The other notice of appeal sought review of the District Court's September 7, 2007 order denying his Section 2241 habeas petition (CRDE 1721; CA Case Number 07-14150-E). On October 5, 2007, the Eleventh Circuit Court of Appeals dismissed the appeal of the September 7, 2007 Order for want of prosecution, as Noriega did not pay the docketing and filing fees (CRDE 1728; CA Case Number 07-14150-E). On October 17, 2007,

Noriega filed a motion for a certificate of appealability with respect to the pending appeal of the August 24, 2007 Order (CRDE 1731). The United States filed an opposition to that motion on October 18, 2007 (CRDE 1732). That matter is still pending.

On October 26, 2007, Noriega filed this petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, a petition for a writ of mandamus, pursuant to 28 U.S.C. § 1361, and a petition for other appropriate relief under 28 U.S.C. § 1651 (DE 1).[6]

II. Noriega's Arguments Based on the Geneva Conventions are not Properly Before this Court.

Once a Magistrate Judge issues a certificate of extraditability, the determination of extraditability is not directly appealable. However, a limited collateral review is available through a petition for a writ of habeas corpus. *See Peroff v. Hylton*, 563 F.2d 1099, 1102 (4th Cir. 1977). The district court's review is limited to three issues: (1) did the magistrate court have jurisdiction over the extradition proceeding; (2) was the defendant charged with extraditable offenses under the Treaty; and (3) was there any evidence supporting the finding of probable cause. *See Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Afanasjev v. Hurlburt*, 418 F.3d 1159, 1163 (11th Cir. 2005); *Martin v. Warden*, 993 F.2d 824, 828 (11th Cir. 1993). As Noriega does not advance any of these

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[6] While Noriega properly frames his petition as one for a writ of habeas corpus, pursuant to Title 28, United States Code, Section 2241, he also purports to seek, in the alternative, a writ of mandamus or other appropriate relief under Title 28, United States Code, Sections 1361 and 1651. However, a writ of mandamus is only appropriate when a petitioner establishes that: (1) he has a clear right to the relief requested; (2) the respondent has a clear duty to act; and (3) no other adequate remedy exists. *Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 2003); *see also Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (mandamus "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty"). Noriega cannot meet this high burden of proof. As explained *infra*, the proper remedy to challenge the certificate of extraditability is a petition for writ of habeas corpus, and the Geneva Conventions do not provide a basis for mandamus or other extraordinary relief.

three grounds for review in his habeas petition, but rather raises a claim under the Geneva Conventions, his habeas petition should be denied by this Court.

Such a claim could only be raised with the Secretary of State. Once a fugitive has been found extraditable by the Judicial Branch, responsibility transfers by the governing statute to the Secretary of State. *See* 18 U.S.C. § 3186. Significantly for this case, that statute commits to the Secretary's sole discretion the decision whether the fugitive will actually be surrendered to the requesting foreign government. *See Id.* ("The Secretary of State *may* order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.") (emphasis added). The Supreme Court has made clear that, as this statutory provision reflects, the surrender of a fugitive to a foreign government is "purely a national act . . . performed through the Secretary of State," within the Executive's "powers to conduct foreign affairs." *In re Kaine*, 55 U.S. 103, 110 (1852); *see also Plaster v. United States*, 720 F.2d 340, 354 (4th Cir. 1983) ("Within the parameters established by the Constitution, the ultimate decision to extradite is, as has frequently been noted, reserved to the Executive as among its powers to conduct foreign affairs."); *accord Martin*, 993 F.2d at 829. For extraditions "[t]he Secretary exercises broad discretion and may properly consider factors affecting both the individual defendant as well as foreign relations – factors that may be beyond the scope of the magistrate judge's review." *Sidali v. INS*, 107 F.3d 191, 195 n.7 (3d Cir. 1997); *see also Martin*, 993 F.2d at 829.

Thus, while the Secretary may consider a broad range of arguments against surrender, habeas review of a certification of extraditability is narrowly circumscribed and does not extend to the arguments Noriega raises here.

The enactment by Congress of the Military Commissions Act of 2006, Pub.L. No. 109-366, § 5(a), Oct. 17, 2006, 120 Stat. 2631,[7] confirms the central role of the Executive Branch here. Section 5(a) of the Military Commissions Act of 2006 has codified the principle that the Geneva Conventions are not judicially enforceable by private parties.[8] In any event, as two courts have already determined in evaluating the same claims, the United States has fully complied with the Geneva Conventions.[9] For the benefit of this Court, the United States reiterates below the reasons that Noriega's Geneva Conventions claims lack merit.

III. The Requested Extradition is in Full Accord with the Geneva Conventions.

Even if Noriega were able to raise it in this proceeding, his argument that the Geneva Conventions prohibit his extradition to France is unavailing. At the outset, it is important to note that, prior to the adoption of the Geneva Conventions, the United States possessed the full panoply of rights and powers inherent in any sovereign nation – including the power to transfer or extradite a prisoner of war to another country. When it became a party to the Geneva Conventions, the United

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[7] That provision states: "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories."

[8] The intent of this unambiguous statute is confirmed by the legislative history. House Report 109-664(II) states that Section 5(a) "would prohibit any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable in any court of the United States." H.R. 109-664(II) refers to Section 5(a) as Section 6(b) because the numbering, but not the substance, of that subsection of the Act changed during the legislative process.

[9] While the constitutionality of certain portions of the Military Commission Act are currently before the Supreme Court for review, *Boumediene v. Bush*, 476 F.3d 981 (CADC 2007), *cert. granted*, 127 S.Ct. 3078 (June 29, 2007), the constitutionality of Section 5(a) has not been challenged. Indeed, Section 5(a) does not touch upon the Suspension Clause to the United States Constitution because it does not purport to strip anyone of the right to file a habeas petition.

States agreed to abide by certain express limitations on its pre-existing powers as a sovereign nation. Thus, the relevant question is not whether the Geneva Conventions specifically grant the United States the power to extradite a prisoner of war to another country. The question rather is to what extent the Geneva Conventions expressly limit the United States' pre-existing power to extradite a prisoner of war to face criminal charges in another nation.

A. Article 118 of Geneva III Does Not Bar Noriega's Extradition to France.

The only provision of the Geneva Conventions relied on by Noriega in support of his claim that the requested extradition is barred is Article 118 of Geneva III. Noriega argues that Article 118 "requires that [the] United States repatriate [him] to the Republic of Panama upon his release from the custody of the Bureau of Prisons." (DE 1:11). This is simply not the case. Article 118 provides that a prisoner of war "shall be released and repatriated without delay *after the cessation of active hostilities*" (emphasis added). Obviously, Noriega was not repatriated to Panama upon the cessation of hostilities, as hostilities ceased nearly two decades ago. That is because Article 118 cannot be read in isolation – as Noriega attempts to do – but rather must be read in accordance with other provisions of the Geneva Conventions. In particular, Article 119 of Geneva III provides, in part:

> Prisoners of war against whom criminal proceedings for an indictable offense are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted of an indictable offense.

This is precisely the provision that allowed the United States to retain custody over Noriega, put him on trial, and confine him during the duration of his federal criminal sentence long after the hostilities in Panama that resulted in his capture had ceased. Indeed, "[t]he Convention clearly sets POWs convicted of crimes apart from other prisoners of war, making special provision for them in Articles

82-108 on 'penal and disciplinary sanctions.'" *United States v. Noriega*, 808 F.Supp. 791, 799-800 (S.D. Fla. 1992)(*Noriega I)*.

B. Article 119 of Geneva III Provides for the Continued Detention of POWs to Face Criminal Charges.

By the same token, Article 119 of Geneva III allows for the continued detention of Noriega based upon pending "criminal proceedings" for another "indictable offense" in France, and his detention in France may continue "until the completion of the punishment" on the separate and distinct French charges. "[T]he ultimate goal of Geneva III is to ensure humane treatment of POWs," *Noriega I*, 808 F.Supp. at 799; it is not to prevent them from facing justice for crimes they have committed. Nothing in the Geneva Conventions suggests that a prisoner of war cannot be extradited from one Party nation to face criminal charges in another Party nation. To the contrary, the official commentary to Article 119 confirms that Geneva III contemplated detention of prisoners of war for criminal proceedings without specifying that such detention is limited to detention by the nation that originally captured the prisoner of war:

> This amendment was considered necessary since it was not the intention of the drafters of the Convention that a prisoner should be detained because proceedings were being taken against him or because he was summoned to appear before court for neglect of some obligation in civil law; they were thinking only of prisoners of war subject to criminal proceedings. It should be noted that the present provision does not oblige the Detaining Power to detain prisoners under such prosecution or conviction; it is a step which the Detaining Power may take if it wishes.

3 International Committee of the Red Cross, *Commentary on the Geneva Conventions* (J. Pictet, ed., 1960) (*"Commentary").* As Judge Hoeveler noted: "nothing in the [Geneva III] suggests that honoring a treaty between parties to the Convention concerning extradition for a criminal offense is prohibited." *Noriega II*, 2007 WL 2947572, *3.

C. Article 12 of Geneva III Allows for the Transfer of POWs Between Parties to the Conventions.

The only restrictions placed on the criminal extradition of a POW are specified in Article 12 of Geneva III, which expressly provides for the transfer of POWs between parties to the Geneva Conventions "after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." This provision is not a grant of authority to transfer POWs – that authority pre-existed the creation of the Geneva Conventions. It is, instead, a limitation upon that pre-existing authority.

The Commentary to Article 12 makes clear that this provision establishes two, and only two, prerequisites for the transfer of POWs. The first is that "prisoners of war may only be transferred from one Power which is a party to the Convention to another Power which is a party to the Convention." That prerequisite is satisfied here, as both France and the United States are parties to the Conventions. The second prerequisite is that "such transfer may only take place after the transferring Power has satisfied itself of the willingness and ability of the receiving Power to apply the Convention." As explained in more detail in Section IV below, that prerequisite also has been satisfied.

While Article 12 does not expressly define "transfer," as Judge Hoeveler correctly pointed out, Article 45 of the Fourth Geneva Convention, which was adopted the same day as the Third Geneva Convention, "specifically provides that its protections for civilians (as compared to the Convention's protections for POWs) do not constitute an obstacle 'to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.'" *Noriega II*, 2007 WL 2947572, *2. As Judge Hoeveler also noted, the commentary to Article 45 makes clear that the definition of the term "transfer"

includes "extradition." *Id.* Although the purposes of the Fourth Convention are different from those of the Third, Noriega advances no reason why "transfer" would have different meanings in similar provisions of those Conventions that were adopted the same day, nor can he offer any rationalization as to why the Conventions would allow for Noriega's extradition to France to face criminal charges if he was a civilian protected person, but not as a POW. Indeed, it is illogical for the Geneva Conventions to provide POWs with greater shielding from criminal prosecutions than civilian protected parties.

Contrary to Noriega's claims, Article 12 is not limited to transfers of a POW between allies to the conflict that originally led to the capture of the POW. As the Commentary to Article 12 makes clear, the need to make provisions in the Geneva Conventions for the protection of POWs who are transferred between nations was highlighted by the fact that transfers of POWs were likely to occur between allies with the creation of "military organizations for collective defence such as the North Atlantic Treaty Organization and the Warsaw Pact," but Article 12 is in no way limited to such circumstances. The unambiguous language of Article 12 cannot be limited by an example in a commentary. Moreover, under Noriega's proposed interpretation of Article 12, the United States could extradite Noriega to France had France taken up arms against Panama, but because France was not a combatant in the conflict between the United States and Panama, he can escape French justice.[10] This suggestion is unreasonable and at odds with the basic principles of the Conventions. Indeed, the transfer of POWs under Article 12 between Parties to the Conventions that were not allies in the underlying armed conflict is not without precedent. During the war between

[10] If Noriega is returned to Panama, he cannot then be extradited to France in light of Article 24 of the 1972 Panamanian Constitution, which prevents the extradition of Panamanian nationals.

the Soviet Union and Afghanistan, Afghanistan transferred two Soviet POWs to Switzerland pursuant to Article 12. Switzerland was obviously not a party to the Soviet/Afghan War.

In the past, Noriega himself has acknowledged that Article 12 is not limited to transfers of POWs between allies in an armed conflict. When Noriega was first brought to the United States to face criminal charges, he cited to Article 12 in an attempt to have himself removed to a neutral third party. In his Ex-Parte Demand to be Transferred to a Neutral Third Party Country, Noriega "invoke[d] Part II, Article 12 and demand[ed] that the United States of America transfer him out of their custody to the custody of a willing third country who is a High Contracting Party so that this willing country may have the responsibility of applying each section and article of Geneva Convention III." *Noriega II*, 2007 WL 2947572, *3, n. 15. As Judge Hoeveler noted, Noriega's "demand that he be 'immediately interred in a third country willing to accept him from which he may be repatriated or released,' presents the question of what would be the situation if that request had been granted and Defendant had been sent to France. It seems plausible that while France was detaining him, France also could have proceeded with criminal charges against him and, thus, he would be facing those charges in any event." *Id.*

Thus, when properly read in conjunction, Articles 12, 118 and 119 of Geneva III provide as follows: a prisoner of war must be repatriated following the cessation of hostilities unless he faces, or has been convicted of, indictable criminal charges in either the Detaining Power or another Party to the Conventions if the Detaining Power has satisfied itself of the other Party's willingness and ability to provide the POW with treatment consistent with his status as a prisoner of war. Given that all of those conditions have been satisfied, the Geneva Conventions do not bar Noriega's extradition to France.

D. Article 129 of Geneva III Further Illustrates that the Convention Contemplated the Transfer of POWs.

That Geneva III contemplated the transfer between nations of individuals subject to its protections is further highlighted by Article 129, which authorizes a signatory to "hand over . . . for trial to another High Contracting Party" a person alleged to have committed a war crime, "provided such High Contracting Party has made out a prima facie case." *See* 3 *Commentary*, Art. 129 (explaining this article as an extradition provision); *accord*, Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 Naval War College International Law Studies (Newport, RI, 1977), p. 376. Clearly Article 129 does not apply to the current extradition, as France does not seek Noriega's extradition as a war criminal but rather as a money launderer. However, Article 129 does serve to further demonstrate that the goal of the Conventions is to insure the humane treatment of POWs, not to prevent them from standing trial for the crimes they have committed.

Noriega attempts to stand Article 129 on its head by arguing that, because Article 129 makes specific provision for the extradition of war criminals, the absence of an explicit provision for an ordinary criminal extradition must mean that such an extradition is prohibited. However, Article 129 does not grant authority to extradite a war criminal but rather establishes a wholly new affirmative duty on nations to seek out, arrest and either try war criminals in their own courts or extradite them to stand trial in another Party nation. The imposition of this new duty to either try or extradite a war criminal cannot strip the United States of its pre-existing authority as a sovereign nation to extradite a POW to face other criminal charges.

In short, Noriega's reliance on Article 118 of Geneva III for an absolute right of repatriation is misplaced. In light of the provisions of the Geneva Conventions that allow for both the detention of prisoners of war during the pendency of criminal proceedings and the transfer of prisoners of war

between member states, the criminal extradition of Noriega is in complete accord with Geneva III. As with any treaty, the view of the Executive Branch on the proper interpretation of Geneva III is to be accorded great weight by the courts. *See El Al Israel Airlines, Ltd. v. Tseng,*, 525 U.S. 155, 168 (1999); *Sumitomo Shoji America, Inc. V. Avagliano*, 457 U.S. 176, 184-185 (1982).

IV. The Rule of Non-Inquiry Bars Consideration of the Treatment Noriega Will Receive in France, but Even if it Did Not, the United States Has Complied with Geneva III by Confirming that France will Afford Noriega Treatment Consistent with Judge Hoeveler's Determination that He is a Prisoner of War.

To the extent that Noriega is arguing that France might not accord him proper treatment under the Geneva Conventions once he is extradited, that claim is not only beyond the proper scope of habeas review of a magistrate's decision on extraditability, but also barred by the Rule of Non-Inquiry. Because extradition matters necessarily implicate the foreign relations of the United States and have traditionally been entrusted to the broad discretion of the Executive, the federal courts have for many decades adhered to a Rule of Non-Inquiry regarding humanitarian challenges to extradition to a foreign country. *See, e.g., Ahmad v. Wigen*, 910 F.2d, 1063 (2d Cir. 1990); *Lopez-Smith v. Hood*, 121 F.3d 1322 (9th Cir. 1997); *United States v. Kin-Hong*, 110 F.2d 103 (1st Cir. 1997); *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999). This doctrine is constitutionally based, and has been applied in numerous instances by the federal courts of appeals – based on a line of Supreme Court precedent – to deny habeas relief in attacks on extraditions. As the Circuits have explained, the Rule of Non-Inquiry "is shaped by concerns about institutional competence and by notions of separation of powers." *Kin-Hong*, 110 F.3d at 110. As discussed above, "[e]xtradition is an executive, not a judicial, function. The power to extradite derives from the President's power to conduct foreign affairs." *Martin*, 993 F.2d at 828. As a result, "[t]he interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge

concerning the fairness of its laws and the manner in which they are enforced. It is the function of the Secretary of State to determine whether extradition should be denied on humanitarian grounds." *Ahmad*, 910 F.2d at 1067.

Of considerable importance to this case, "[t]he Secretary may . . . decline to surrender the [defendant] on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations. Additionally, the Secretary may attach conditions to the surrender of the [defendant]. Of course, the Secretary may also elect to use diplomatic methods to obtain fair treatment for the [defendant]." *Kin-Hong*, 110 F.2d at 109-10. One type of condition the Secretary may place on an extradition is a demand that the requesting country provide assurances regarding the individual's proper treatment. *See Jimenez v. United States District Court*, 84 S. Ct. 14, 16-17 n.10 (1963) (Goldberg, J., in chambers) (describing commitments made by foreign government to Department of State as a condition of surrender); *United States v. Baez*, 349 F.3d 90, 92-93 (2d Cir. 2003) (referring to assurances provided by United States upon extradition of fugitive by another country).

Thus, it is within the sole discretion of the Secretary of State to insure that the United States abides by any international commitments relevant to Noriega's extradition to and confinement in France. Even if issues related to Noriega's treatment in France were properly raised in this proceeding, however, the United States, as it explained before Judge Hoeveler, has fully complied with any obligations under Article 12 of Geneva III. Article 12 requires that the transfer of POWs between parties to the Convention "may only take place after the transferring Power has satisfied itself of the willingness and ability of the receiving Power to apply the Convention." As detailed in the attached Declaration of Clifton M. Johnson, Assistant Legal Adviser for Law Enforcement

and Intelligence at the Department of State, which was submitted to Judge Hoeveler when this issue was before him, the United States has confirmed that France intends to afford Noriega treatment consistent with the benefits that Noriega enjoyed in prison in the United States, in accordance with this Court's ruling and as specified in Geneva III.[11]

Noriega has advanced no evidence to contradict this declaration. Noriega simply relies on a single sentence from the September 7, 2007 daily press briefing of a spokesman for the French Ministry of Foreign Affairs stating that Noriega could not have the status of a POW in France. Such a statement, however, does not contradict or undermine the specific assurances received by the United States with respect to the actual treatment that Noriega would be accorded in France. Indeed, in dismissing his prior Section 2241 Petition, Judge Hoeveler noted that while Noriega had submitted a press account of a statement by the French Ambassador to Panama in which the Ambassador allegedly stated that Noriega "will not enjoy the privileges [of his POW status]," the news articles advanced by Noriega himself also made clear that the "French Foreign Ministry . . . stated that General Noriega will receive the same privileges he received in the United States." *Noriega III*, 2007 WL 2947981, *2. Simply put, Noriega has not advanced any new evidence of substance that was not already considered and rejected by Judge Hoeveler.[12]

It is important to note that, in full compliance with Judge Hoeveler's order of December 8, 1992, the United States, during the course of Noriega's incarceration in the United States, has treated

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[11] A copy of the declaration is attached as Exhibit A.

[12] The only other new "evidence"advanced by Noriega is a letter from the French Ambassador to the United States denying a request by Noriega's attorney for an official statement with respect to the treatment Noriega will receive following his extradition to France. Given that such a statement was already provided to the United States, and that France was under no obligation to provide such a statement to Noriega directly, this letter is not evidence of anything.

Noriega in full accordance with the Geneva Conventions' mandates regarding the confinement of a prisoner of war who has been convicted of a criminal offense. *See Noriega I*, 808 F.Supp. 791. Noriega has never alleged otherwise. Prior to filing the extradition complaint, the United States engaged in diplomatic communications with the Government of France to ensure that Noriega would enjoy, upon extradition and incarceration in France, treatment consistent with that which he received in the United States pursuant to Judge Hoeveler's order that he receive the same confinement conditions accorded a prisoner of war. The United States did not ask the Republic of France to declare that Noriega is a prisoner of war. Rather, the United States sought and obtained from the Republic of France specific information regarding the rights to which Noriega will be entitled during his incarceration in France upon his extradition. The conditions of Noriega's confinement are not left open to future interpretation "by some French bureaucrat" (*see* DE 1:5); rather, the United States has confirmed through its communications with France that France will afford Noriega the same benefits he has enjoyed during his confinement in the United States that were mandated by the December 8, 1992 Order.

V. Conclusion

Because Noriega's Geneva Convention-based arguments are not properly raised with this Court, and because, in any event, the Geneva Conventions do not bar Noriega's extradition to France and the United States has fully complied with the Geneva Conventions, the Court should deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Sean Paul Cronin
Sean Paul Cronin
Assistant United States Attorney